CASE NO. 162/99

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
OF SOUTH AFRICA
APPELLANT

AND

GG CAROLUS AND OTHERS
RESPONDENT

BEFORE: MAHOMED CJ, OLIVIER, ZULMAN JJA,

MELUNSKY AND FARLAM AJJA

HEARD: 22 NOVEMBER 1999

DELIVERED: 1 DECEMBER 1999

FARLAM AJA

J U D G M E N T

FARLAM AJA:

[1] This is an appeal, brought with the leave of the Court *a quo*, against the order made by Blignault J, sitting in the Cape of Good Hope High Court, on 15 April 1999, to the effect that orders made on 15 March 1999 by Moosa AJ in terms of sections 38, 42 and 43 of the Prevention of Organised Crime Act 121 of 1998 ("the Act") be rescinded and that the appellant pay the respondents' costs on the party and party scale.

[2] The judgment of Blignault J, which has been reported (see *National Director of Public Prosecutions v Carolus and Others*, 1999 (2) SACR 27 (C)) was followed by Hurt J, sitting in the Durban and Coast Local Division, in *National Director of Public Prosecutions v P J Meyer* (case No 6441/99), a decision given on 29 July 1999.

[3] The main order made by Moosa AJ and was a preservation order in terms of section 38 of the Act. It prohibited the first respondent and any other person from dealing in any manner with certain properties which were listed in two annexures to the order, the first dealing with certain immovable properties and the second with certain movable property.

[4] It was common cause between the parties that the facts alleged by the appellant as the basis for his contention that a preservation order should be made in respect of the properties listed in the annexures to Moosa A J's order all related to activities or offences allegedly committed before 21 January 1999, the date on which the Act came into operation.

[5] The decision of the learned judge in the Court *a quo* to rescind the orders

made by Moosa A J was based on two grounds, viz. (1) that chapter 6 of the Act, which contained the sections relied on by the appellant in support of his application for a preservation order, was not retrospective with the result that it did not apply to the alleged facts relied on by the appellant in support of his application for a preservation order and (2) that on the evidence adduced by the appellant there were no reasonable grounds from which the inference could be drawn that any of the properties fell within the categories of property in respect of which a preservation order could be made, i.e. that none of them was an "instrumentality of an offence" or "proceeds of unlawful activities".

[6] In view of the decision to which he had come on the two points mentioned above the learned judge did not decide a further point which was raised in the proceedings before him, viz. whether certain provisions of the Act are unconstitutional.

[7] When the matter was argued in this Court the parties were requested to confine their submissions initially to the first point decided in the Court *a quo*, viz. whether chapter 6 of the Act is retrospective. It was agreed that if this point were decided in favour of the appellant an opportunity would be afforded to the parties to address arguments at a later date on the other matters referred to above.

[8] Before the parties' submissions and the judgment of Blignault J on the retrospectivity point are considered it is necessary for me to summarise and in some instances to quote in full the main provisions in the Act and then to say something about retrospective legislation, degrees of retrospectivity and the terminology used in respect thereof.

[9] The main considerations which prompted the passing of the Act are set out in the Preamble, which before it was amended by Act 38 of 1999 was in the following terms:

> **"Preamble**. - Whereas the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
>
> AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights;
>
> AND WHEREAS there is a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally and since organised crime has internationally been identified as an international security threat;
>
> AND WHEREAS organised crime, money laundering and criminal gang activities infringe on the rights of the people as enshrined in the Bill of Rights;
>
> AND WHEREAS it is the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals;
>
> AND WHEREAS organised crime, money laundering and criminal gang activities, both individually and collectively, present a danger to public order and safety and economic stability, and have the potential to inflict social damage;

AND WHEREAS the South African common law and statutory law fail to deal effectively with organised crime, money laundering and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities;

AND BEARING IN MIND that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in a pattern of racketeering activity;

AND WHEREAS persons should not benefit from the fruits of organised crime and money laundering, legislation is necessary for the preservation and forfeiture of property which is concerned in the commission or suspected commission of an offence;

AND WHEREAS there is a need to devote such forfeited assets and proceeds to the combatting of organised crime and money laundering;

AND WHEREAS the pervasive presence of criminal gangs in many communities is harmful to the well being of those communities, it is necessary to criminalise participation in or promotion of criminal gang activities".

[10] The Act itself is divided into eight chapters. In what follows I shall quote from the Act as it was before it was amended by Act 38 of 1999.

[11] The first chapter, headed "Definitions and Interpretations", consists of a section (section 1) which contains sixteen definition provisions, of which it is necessary to quote those relating to the categories of property in respect of which preservation orders under section 38 can be made, viz. "instrumentality of an offence" and "proceeds of unlawful activities", as well as the definitions of "pattern of criminal gang activity" and "pattern of racketeering activity":

" '**instrumentality of an offence**' means any property which is concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

'**proceeds of unlawful activities**', means any property or part thereof or any service, advantage, benefit or reward which was derived, received or retained,

directly or indirectly, in connection with or as a result of any unlawful activity carried on by any person, whether in the Republic or elsewhere, except for purposes of Chapter 5 where it means -

(a) any unlawful activity carried on by any person; or

(b) any act or omission outside the Republic which, if it had occurred in the Republic, would have constituted an unlawful activity,

and includes any property representing property so derived;

'**pattern of criminal gang activity** includes the commission of two or more criminal offences referred to in Schedule 1: Provided that at least one of those offences occurred after the date of commencement of Chapter 4 and the last of those offences occurred within three years after a prior offence and the offences were committed -

(a) on separate occasions; or

(b) on the same occasion, by two or more persons who are members of, or belong to, the same criminal gang;

'Pattern of racketeering activity' means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1"

[12] The second chapter, as the heading indicates, deals with offences relating to racketeering activities. Its provisions appear to be modelled on, or at least strongly influenced by, a statute passed by the United States Congress in 1970, viz the Racketeer Influenced and Corrupt Organisations Act ("RICO").

[13] The third chapter deals with offences relating to proceeds of unlawful activities. Among the offences relating to the proceeds of unlawful activities created by the chapter is an offence described in the marginal note to section 4 as "money laundering". Section 6 deals with the acquisition, possession or use of proceeds of unlawful activities. It reads as follows:

"Any person who-

(a) acquires;

(b) uses; or

(c) has possession,

of property and who knows or ought reasonably to have known that it is

or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence."

The provisions in this chapter are for the most part re-enactments of the provisions in chapter 5 of the Proceeds of Crime Act 76 of 1996 ("the Proceeds Act"), which came into operation on 16 May 1997 and was repealed by the Act. Section 6 is substantially a re-enactment of section 30 of the Proceeds Act.

[14] The fourth chapter deals with offences relating to criminal gang activities and, like chapter 2, appears to be modelled on certain provisions in the RICO Act.

[15] Chapter 5, which deals with the proceeds of unlawful activities, is very largely a re-enactment of the first four chapters of the Proceeds Act, which was enacted by Parliament pursuant to proposals made by the Law Commission in its report entitled *International Co-operation in Criminal Prosecutions* (project 98), in which an account was given of the initiatives taken in the British Commonwealth and elsewhere to combat large-scale criminal activity, *inter alia*, by enacting legislation providing for the confiscation of the profits of organised crime. These developments had induced Parliament in 1992 to enact the Drugs and Drug Trafficking Act 140 of 1992, which come into operation on 30 April 1993. That Act provided, in Chapter V, for confiscation orders and restraint orders in respect of realisable property which were similar to those already in existence in various Commonwealth countries and which were

directed at the proceeds of drug offences. The Law Commission recommended that the statutory regime providing for the forfeiture of the proceeds of drug offences should be extended to all offences and the draft bill annexed to its report, which was largely based on legislation already in existence elsewhere in the Commonwealth, was enacted by Parliament as the Proceeds Act.

[16] For a survey of the developments in the Commonwealth, particularly in Australia, which led to enactment of legislation introducing (or in some case re-introducing) forfeiture procedures designed to strengthen the arm of the State in combating organised crime, particularly certain offences such as drug offences, see the judgment of Kirby P, with whom Mahoney and Hendley JJA concurred, given in the New South Wales Court of Appeal in *DPP v Toro-Martinez and Others* (1993) 33 NSWLR 82 at 86-87.

[17] Chapter 5 of the Act provides for the making of confiscation orders against persons convicted of offences, which orders are designed to force the convicted persons to disgorge the proceeds they have received as a result of the offences of which they have been convicted and as a result of other criminal activity which the court finds to be sufficiently related to those offences. Before making a confiscation order the court concerned holds an enquiry in order to determine the value of the benefits received by the accused in connection with the criminal activity in respect of which the order is to be made.

[18] Provision is also made in chapter 5 for restraint orders to be made by the High Court prohibiting persons from dealing with property which may be realised to satisfy a confiscation order, for the seizure of such property and for the appointment of a curator bonis to take care of the property until it is realised or the restraint order is rescinded.

[19] Confiscation orders, which have the effect of civil judgments against the accused person in question, are satisfied from the proceeds of property held by that person or certain gifts made by the accused person to other persons.
[20] It is clear from section 12 (3) and section 19 (1) of the Act, which are both contained in chapter 5, that the provisions of chapter 5 (as was the case with the first four chapters of the Proceeds Act) are retrospective in the sense that in determining the value of the proceeds of an accused person's unlawful activities the Court is not confined to those activities which took place after the coming into operation of the Act or the Proceeds Act but is obliged to consider also unlawful activities which took place before the Act came into operation.

Section 12 (3) reads as follows:

"For the purposes of this Chapter, a person has benefited from unlawful activity if he or she has at any time, *whether before or after the commencement of this Act*, received any advantage, payment, service or reward including any property or part thereof in connection with any criminal activity carried on by him or her or by any other person."

Section 19 (1) is in the following terms:

"Subject to the provisions of subsection (2), the value of a defendant's proceeds of unlawful activities shall be the sum of the values of the payments or other rewards received by him or her at any time, *whether before or after the commencement of this Act*, in connection with the criminal activity carried on by him or her or any other person."
(The emphasis is mine.)

[21] In contradistinction to Chapter 5, which provides for orders directed at persons convicted of criminal offences, Chapter 6, which is headed "Civil Recovery of Property", makes provision for orders to be made for the forfeiture of property which is tainted because it is linked to the commission of crime either because it is proved, on a balance of probabilities, to be "an instrumentality of an offence" referred to in Schedule 1 of the Act or because it is proved, according to the same standard of proof, to be "the proceeds of

unlawful activities". Such orders may be made even if no one has been convicted of having used the property or of having been guilty of the unlawful activities of which the property is said to be the proceeds.

[22] Mr *Seligson SC*, who appeared with Mr *Jamie* for the appellant, stated that the provisions in this chapter were modelled on a statute recently enacted in New South Wales, the Criminal Assets Recovery Act, 1990.

[23] Section 38 of the Act, which provides for the making by a High Court of preservation of property orders in respect of certain property, reads as follows:

> "38. **Preservation of property orders**.-
>
> (1) The National Director may by way of an ex parte application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.
>
> (2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned-
>
> (a) is an instrumentality of an offence referred to in Schedule 1; or
>
> (b) is the proceeds of unlawful activities.
>
> . . ."

[24] Subsequent sections provide, *inter alia*, for the giving of notice of preservation of property orders (section 39), the duration of preservation of property orders (section 40),the seizure of property subject to preservation orders (section 41), the appointment of a *curator bonis* in respect of property (section 42), orders directed to registrars of deeds in respect of immovable

property subject to preservation orders (section 43) and the variation and recission of preservation orders (section 47).

[25] Part 3 of Chapter 6 deals with forfeiture orders.

Section 48, which deals with applications for forfeiture orders, reads as follows:

"48. **Application for forfeiture order. -**

(1) If a preservation of property order is in force the National Director may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.

(2) The National Director shall give 14 days notice of an application under subsection (1) to every person who entered an appearance in terms of section 39 (3).

(3) A notice under subsection (2) shall be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served.

(4) Any person who entered an appearance in terms of section 39 (3) may appear at the application under subsection (1)-

(a) to oppose the making of the order; or

(b) to apply for an order-

(i) excluding his or her interest in that property from the operation of the order; or

(ii) varying the operation of the order in respect of that property,

and may adduce evidence at the hearing of the application."

[26] After dealing in section 49 with cases where persons alleging an interest in property which is subject to a preservation order apply for leave to enter appearance in terms of section 39 (3), the Act provides in section 50 for the making of forfeiture orders. The section contains the following:

"50 **Making of forfeiture order**. -

(1) The High Court shall, subject to section 52, make an order applied for under section 48(1) if the Court finds on a balance of probabilities that the property concerned-

(a) is an instrumentality of an offence referred to in schedule 1; or

(b) is the proceeds of unlawful activities.

(2) The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under such an order.

(3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the High Court from making the order.

(4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated."

[27] Section 52, which provides for the making of orders excluding certain interests in property from the operation of forfeiture orders, as far as is material, reads as follows:

"(1) The High Court may, on application -

(a) under section 48 (3) [which is presumably a misprint for section 48 (4)]; or

(b) by a person referred to in section 49(4) [i.e., a person given leave to enter an appearance late in order to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation of a forfeiture order in respect thereof],

and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.

(2) The High Court may make an order under subsection (1) if it finds on a balance of probabilities that the applicant for such an order -

(a) had acquired the interest concerned legally; and

(b) neither knew nor had reasonable grounds to suspect that the property in which the interest is held -

(i) is an instrumentality of an offence referred to in Schedule 1; or

(ii) is the proceeds of unlawful activities."

[28] Section 54 provides for the situation where a person affected by a forfeiture order did not receive notice of the application therefor.

Subsection (1) provides that such a person may apply for an order excluding his or her interest in the property concerned from the operation of the order or varying the operation of the order in respect of such property.

Subsection (8) provides as follows:

"(8) The High Court may make an order under subsection (1) if it finds on a balance of probabilities that the applicant for such an order -

(a) had acquired the interest concerned legally; and

(b) neither knew nor had reasonable grounds to suspect that the property in which the interest is held -

(i) is an instrumentality of an offence referred to in Schedule 1; or

(ii) is the proceeds of unlawful activities."

[29] In terms of section 56(2) on the date when a forfeiture order takes effect the property subject to the order is forfeited to the State and vests in the *curator bonis* appointed in respect thereof on behalf of the State.

[30] Section 57(1) provides for the sale of the forfeited property by the

curator bonis, subject to any order for the exclusion of interests made, *inter alia*, in terms of section 52(2)(a)

The presumption against retrospectivity

[31] An important legal rule forming part of what may be described as our legal culture provides that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the legislature clearly intended the statute to have that effect: see *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 430. In the context of penalties for criminal offences (which is the subject now under consideration) this Court laid down in *R v Sillas* 1959 (4) SA 305 (A) at 311 E - F that where a penalty is increased the accused is entitled to be treated on the basis of the penalty existing at the date of the offence, and that a penalty cannot without *express words or clear implication*, (my emphasis) be increased against a wrongdoer after the commission of the offence (per Schreiner JA). In the same case it was further held by Schreiner JA that the basic rationale of the presumption is that the Legislature must be taken not to have intended anything unjust.

Consistent with the underlying rationale of the presumption and the requirement that it can be rebutted only by express terms or clear implication, is the rule that if the court is left in doubt as to the operation of the statute, the law as existing before the enactment must be applied. This was correctly stated by Van Winsen AJ in *Njobe v Njobe and Dube NO* 1950 (4) SA 545 (C) at 552 as

follows:

> "The amending Proclamation is avowedly purporting to make retrospective a state of affairs which did not previously have retrospective effect. If because of its inept wording, the Proclamation leaves in doubt the nature and extent of its retrospective effect, then so much of the previously existing legal position as is not clearly and unambiguously affected by the amending Proclamation must be treated as unaffected thereby."

[32] This canon of interpretation was described by my brother Olivier JA in *Transnet Ltd v Chairman, National Transport Commission* 1999 (4) SA 1 (SCA) at 7 A as a "time-honoured principle" and in *Gardner* v *Lucas* (1878) 3 App Cas. 582, a decision of the House of Lords, Lord Blackburn (at 603) described it as a "general rule, not merely of England and Scotland, but, I believe, of every civilised nation".

[33] In the *Transnet Ltd* case, *supra*, at 7 B - D, it was pointed out that a distinction is made in the case law between "'true' retrospectivity (i.e. where an Act provides that from a past date the new law shall be deemed to have been in operation) and cases where the question is merely whether a new statute or an amendment of a statute interferes with or is applicable to existing rights". Reference was then made to a number of decisions of this Court, starting with *Shewan Tomes and Co Ltd v Commissioner of Customs and Excise* 1955 (4) SA 305 (A) at 311. "True" retrospectivity was described (at 7 E) as being "strong" while the adjective "weaker" was applied to retrospectivity in the second sense as it is used in our case law.

[34] In *Benner v Canada (Secretary of State)* (1997) 42 CRR (2d) 1 (SCC), a decision of the Supreme Court of Canada, Iacobucci J referred (at 17) to the fact that the terms "retroactivity" and "retrospectivity" can be confusing and he quoted with approval definitions of the two terms given by the well known Canadian writer on the interpretation of statutes, Elmer A Driedger, in an article in (1978) 56 *Canadian Bar Review* 264 at 268-9 as follows:

> "A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past

event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective changes the law from what it otherwise would be with respect to a prior event."

[35] In terms of this terminology the expression "retroactivity" is used for retrospectivity in the "strong"sense while the expression "retrospectivity" is reserved for what is described as retrospectivity in the "weaker" sense.

[36] It appears clearly from the many cases on the point, both in our law and in overseas jurisdictions, that the basis of the presumption against retrospectivity (in the strong and weak senses) is what Stevens J described, when giving the opinion of the United States Supreme Court in *Landgraf v USI Film Products et al* 511 US 244 (1994) at 265 as "elementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."

[37] Mr *Seligson* pointed out that he was not contending that chapter 6 of the Act was to be interpreted as being retrospective in the "strong" sense. He submitted that chapter 6, on a proper construction, does apply as from the date the Act came into operation to activities that took place before it came into operation, with the result that property can be regarded as an instrumentality of an offence or as proceeds of unlawful activities for the purposes of the section 38 of the Act even if the such activities in question took place before the Act came into operation.

In other words, he argued for retrospectivity in the "weak" sense.

[38] Mr *Seligson* stated that it is obvious that, while the Act contains new

provisions which are unprecedented in a number of respects, it builds on earlier legislation, in particular the Proceeds Act, and provides drastic remedies to assist the State to combat an intolerable situation, namely a large increase in organised crime. The main objective of the Act, he said, is to prevent criminals from benefiting from the proceeds of crime and to discourage the use of property for criminal purposes.

[39] Chapter 6, with which we are presently concerned, operates outside and independently of the other chapters and on a proper analysis, so he submitted, the provisions of chapter 5 are not relevant for the purposes of interpreting chapter 6.

He submitted further that the forfeiture provisions in chapter 6 cannot be described as purely procedural and that the distinction between statutes regulating procedure and those dealing with substantive rights is not helpful in this case.

[40] Mr *Seligson* submitted that the provisions do not involve the impairment or infringement of any vested rights because the acquisition or use of property acquired through the proceeds of crime would not give a criminal any rights enforceable in law and that in any event there is no basis for assuming that Parliament would have been reluctant or would have considered it unfair to create a forfeiture mechanism which would strip criminals of the proceeds of their unlawful activities even if such activities had taken place before the Act

came in operation.

[41] He contended further, relying on *R v Grainger* 1958 (2) SA 443 (A) and *S v Premier Wire (Pty) Ltd* 1985 (2) SA 252 (E), that the respondents in the present case cannot maintain that they had any right to expect that the law would not change so as to remove the requirement that there be a prosecution before forfeiture proceedings could be instituted and thereby deal more effectively with organised crime.

[42] In dealing with the presumption against retrospectivity he relied strongly on the decision of the House of Lords in *L'Office Cherifien des Phosphates and another v Yamashita - Shinnihon Steamship Co Ltd:* [1994] 1 AC 486. In that case the main opinion was delivered by Lord Mustill who (at 525 E - F) referred with approval to the following statement by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 (CA) at 724:

> "In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

Lord Mustill continued (at 525 F - H):

> "Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."

[43] The statutory provision under consideration in the *Cherifien* case was section 102 of the Court and Legal Services Act 1990, which amended the Arbitration Act 1950 by inserting a new section, section 13 A. This section empowered an arbitrator, unless a contrary intention was expressed in the arbitration agreement, to make an award dismissing a claim if there had been an inordinate and inexcusable delay on the part of the claimant which caused the substantial risk of unfairness or serious prejudice to the respondent .

[44] The House of Lords held that in dismissing the claim an arbitrator was entitled to take into account a claimant's inordinate and inexcusable delay which occurred before section 13 A came into operation.

[45] The House was influenced in coming to this conclusion by the fact that the right to pursue a claim before an arbitrator which had been inordinately and inexcusably delayed was weak since, as the delay showed, the claimant had not troubled to enforce it for a long time and it was not unfair to allow the new section to apply to claims brought before the coming into force of the new power.

[46] In the present case, so Mr *Seligson* argued, the consequences in the circumstances of holding the remedies in chapter 6 to be applicable in respect of past conduct and events would not be so unfair that the Legislature could not have intended this. The property forfeited under chapter 6 could have been realised in satisfaction of a confiscation order under chapter 5 if the respondents had been convicted, which was a further reason for holding that there was no

unfairness in making chapter 6 operate retrospectively.

[47] Mr *Seligson* also relied on two recent decisions given in the United States, one a decision of the U.S. Court of Appeals for the Second Circuit, viz. *United States of America v Certain Funds Contained in Account Nos 600 - 306 211 - 006, 600 - 306 211 - 011 and 600 - 306 211- 014 Located at the Hong Kong and Shanghai Banking Corporation et al* 96 F 3d 20 (2nd Cir. 1996) and the other a decision of the U.S. Court of Appeals for the Sixth Circuit, *United States of America v Four Tracts of Property on the Waters of Leiper's Creek* 1999 WL 377773 (6th Cir. (Tenn.)).

In what follows I shall refer to the first case as "the *Hong Kong and Shanghai Bank* case" and to the second case as "the *Leiper's Creek* case".

[48] In the *Hong Kong and Shanghai Bank* case the facts were that the US Government sought the forfeiture of assets valued at between 1.5 and 3 million dollars located in Hong Kong. It alleged that the defendants *in rem* (i.e., the Funds) constituted the proceeds of a conspiracy to import heroin into the United States and to launder the proceeds of that smuggling, The Government's Verified Complaint in the action was filed in September 1991. In April 1992 the claimants to the property filed a motion for judgment on the pleadings requesting that the court dismiss the complaint for lack of jurisdiction over the *res* because the *res* was located outside the United States and no statute conferred jurisdiction on the federal courts in these circumstances. In October 1992 the statute conferring jurisdiction on federal courts over civil forfeiture proceedings was amended to provide district courts with *in rem* jurisdiction over a *res* located in a foreign country. A decision by the United States District Court for the Eastern District of New York dismissing the action for lack of jurisdiction and holding that the amendment could not be applied retrospectively as there was no clear showing of congressional intent to make the amendment retrospective was overturned on appeal to the United States Court of Appeals, Second Circuit, which held that the amendment could be applied retrospectively to pending proceedings. The decision rested on two bases. One was that as the statute in question was procedural, in that it conferred jurisdiction, it could be applied retrospectively. The other basis (at 24) was that the new statute did

> "not take away any rights possessed by a party, increase liability, or attach new legal consequences to past conduct. The claimants never had any right to property resulting from illegal gains, and their alleged drug

> smuggling and money laundering have always carried criminal penalties. One of the legal consequences of drug smuggling or money laundering is that the resulting illegal proceeds are subject to forfeiture to the government. . . .. The mere fact that people who commit crimes within the jurisdiction of the United States manage to secrete proceeds of those crimes out of the country does not mean that they enjoy any greater rights to those proceeds. Accordingly, it cannot be said that [the new section] ever created any new legal consequences or impaired any existing rights. . .”

[49] In the *Leiper's Creek* case the United States Government instituted forfeiture proceedings against the Leiper's Creek property in 1992 . The claimant had purchased the property in 1989 using the proceeds from drug trafficking activities which had taken place in the early 1970's. The forfeiture provision on which the Government relied was enacted in 1978 several years after the drug trafficking transactions which generated the funds used by the claimant to purchase the property. The United States Court of Appeals, Sixth Circuit, held that the 1978 statute would be applied retrospectively so that the property could be forfeited. Its decision rested on two bases. The second basis for the Court's decision (which is relevant here) was that the claimant

never had a right to the proceeds of his illegal behaviour and therefore forfeiture of the property as "proceeds" could not impair any vested rights. On this point the court followed the decision in the *Hong Kong and Shanghai Bank* case.

[50] Mr *Seligson* endeavoured to deal with the point that the legislature has expressly made the provisions of chapter 5 retrospective, as appears from sections 12(3) and 19 (1), and has also in the definitions of "pattern of criminal activity" and "pattern of racketeering activity" made it clear that at least one of the Schedule 1 offences the commission of which is necessary in order to bring the definitions into play may have taken place before the Act came into operation. From these provisions it is clear that the legislature was aware of the presumption against retrospectivity and knew how to make it clear when it intended part of the Act to apply retrospectively.

[51] Chapter 5, said Mr *Seligson*, expressly deals with the past because it provides for what amounts to an historical enquiry into what benefits the accused derived from the offence or offences of which he or she has been convicted and any criminal activity which the court finds to be sufficiently related to those offences. Secondly the forfeiture order, which is linked to a criminal conviction for an offence committed in the past, is arguably penal in its effect because it flows from the conviction and is an additional burden imposed on the accused who is ordered in terms of the procedure created by chapter 5 to make a payment of money which can be satisfied from his whole estate, including assets which are in no way tainted by being linked to any criminal activity, which assets can be frozen by means of restraint orders made in terms of Part 3 of Chapter 5. Chapter 6 on the other hand, he submitted, envisages simply an enquiry into two categories of property at the time of the court hearing and allows preservation and forfeiture orders only in respect of such property. In this regard he relied on the use of the present tense "is" in sections 38 (2) and 50 (1) .

[52] There is substance in some of the submissions made Mr *Seligson* but for the reasons that follow I am of the view that the appeal must nevertheless fail.

[53] I do not agree that chapter 6 can be differentiated from chapter 5 because the enquiry in the case of the former relates only to the present while the

enquiry in the case of the latter looks backwards to the past, which prompted the legislature to make it clear in the latter case that the enquiry extends backwards to the period preceding the coming into operation of the Proceeds Act. I say this because it is clear that, in order to decide whether property is tainted because it is linked to criminal activity, so that it is to be forfeited under an order made in terms of chapter 6, it will be necessary for the court to enquire into the question as to whether property is the proceeds of criminal activities, which necessarily involves an enquiry into the past, whether the property *was* derived, received or retained in connection with or as a result of any unlawful activity. The use of the present tense in sections 38 (2) and 50 (1) merely indicates that the property must exist at the time the order is made. An enquiry under chapter 6 looks as much backwards as does one under chapter 5. The fact that the legislature considered it necessary to state expressly in section 12 (3) and 19 (1) and, for that matter, in the definitions of "pattern of criminal gang activity" and "pattern of racketeering activity" that offences committed before the Act came into operation can be looked at in matters falling under chapters 2, 4 and 5 is a strong indication, as Blignault J found, that it did not intend the provisions of chapter 6 to be applied retrospectively.

[54] In my view, therefore, the omission of the phrase "whether before or after the commencement of this Act" in chapter 6 is the most formidable obstacle to the acceptance of the contentions advanced on behalf of the appellant. As

pointed out above, Mr *Seligson* was unable to advance any cogent argument which would explain Parliament's failure to use the same formula in chapter 6 which it used in chapter 5 when it intended that chapter to be retrospective.

[55] There may indeed be cogent reasons why Parliament deliberately decided not to make chapter 6 retrospective. One such reason is the factor adverted to by Hurt J at pp 26 - 7 of his judgment in the unreported case of *National Director of Public Prosecutions v P J Meyer*, where reference is made to sections 52 (2) and 54 (8) of the Act, which, it will be recalled, provide for the High Court, when it makes or has made a forfeiture order, to exclude certain interests in property from the operation of the order when it finds that the person applying for the exclusion order acquired the interest concerned legally and neither knew *nor had reasonable grounds to suspect* that the property in which the interest is held is an instrumentality of a Schedule 1 offence or is the proceeds of unlawful activities.

[56] Before the coming into operation of section 30 of the Proceeds Act, on 16 May 1997, a person who legally acquired property which was or formed part of the proceeds of crime acquired indefeasible title thereto even if he or she had reasonable grounds to believe that it was or formed part of the proceeds of crime. (Section 30 of the Proceeds Act has in essence been re-enacted as section 6 of the Act.) The position in regard to stolen property was different. A person who received into his or her possession stolen property and who had

reasonable grounds to believe that it was stolen committed a crime under section 37 of the General Law Amendment Act 62 of 1955. In other words although the negligent receipt of stolen property was an offence the negligent receipt of the proceeds of crime was not.

[57] The new principle introduced by section 30 of the Proceeds Act has very important consequences for many persons engaged in commerce.

[58] If Mr *Seligson* was correct in submitting that chapter 6 is retrospective it would create a cause of action to justify the seizure of property, which cause of action did not exist before the commencement of the Act. In my view such a result would be lead to an unfair result: it is unlikely that that could have been intended by Parliament.

[59] Support for this conclusion is to be found in a case cited by Mr *Arendse*, who appeared with Mr *Mihalik* for the respondents, namely *Plewa v Chief Adjudication Officer* [1995] 1 AC 249, a decision of the House of Lords given after its decision in the *Cherifien* case. The facts of this case were that Plewa received a retirement pension from January 1981, which contained an addition in respect of his wife, who was in part-time paid employment, the earnings from which would have affected the amount of Plewa's pension. At the time when the unadjusted pension was received beneficiaries who received an overpayment of benefit were not required to repay it where due care and

diligence had been used to avoid the overpayment: this was because of the provisions of section 119 (2) of the Social Security Act, 1975, which was replaced in April 1987 by section 53 of the Social Security Act, 1986. This latter section removed the due care and diligence defence to a claim for repayment and also imposed liability on third parties for innocent misrepresentation or failure to disclose. It was held (at 257 G - 258 D) that the new provision did not apply retrospectively because what was described as "a considerable degree of unfairness" could result to third parties who would come under an obligation to repay which did not exist before section 53 of the 1986 Act came into force.

> "Although the position of the actual payee is obviously not as clear as that of a third party", said Lord Woolf (at 258 B - C), "I would have been inclined to attach more importance to section 53's possible retrospective unfair effect than the Court of Appeal did in [*Secretary of State for Social Security v Tunnicliffe supra*, which was quoted with approval in the *Cherifien* case and in which it was held that section 53 was retrospective]. This is because it removed the defence of due care and diligence. If recipients would not have been under a liability in fact to make a repayment under the former machinery then from a practical point of view they were being placed under a liability which did not previously exist by the change in the law. This is a situation where the presumption against retrospectivity should apply. It is desirable that in this situation legislation should make it clear whether the new provision is to be retrospective or not."

[60] In my view the cumulative effect of the unfairness, the legal culture

leaning against retrospectivity where there is unfairness, the fact that Parliament refrained from repeating the "whether before or after the commencement of this Act" phrase used in sections 12 (3) and 19 (1) and the fact that conduct before the commencement of the Act is specifically referred to in the definitions of "pattern of criminal gang activity" and "pattern of racketeering activity" leads me to the conclusion that on a proper interpretation of the Act chapter 6 was not intended to be retrospective.

[61] The two American cases cited by Mr *Seligson* do not assist at all because the factors enumerated in the previous paragraph were not applicable in those cases.

[62] For these reasons I am satisfied that the appeal should fail.

[63] The following order is made:

The appeal is dismissed with costs, which shall include those occasioned by the employment of two counsel.

I. G. FARLAM
ACTING JUDGE OF APPEAL

CONCUR:
MAHOMED CJ
OLIVIER JA
ZULMAN JA
MELUNSKY AJA